NATURAL LAW AND NATURAL RIGHTS REVISITED
ON (DIS)CONNECTING DIFFERENT JURIDICAL TRADITIONS

Juha-Pekka Rentto

Professor Virginia Black addressed in Vol. 22 of this journal the question of whether Natural Law and individual rights are mutually compatible notions[1]. Her argument was aimed to show that they are. I shall undertake to argue that the interrelationship of the notions is by no means unproblematic, because Natural Law and natural rights are not just two different concepts, but they are the capstones of two (or several) radically different ways of thinking about matters moral and juridical. We shall proceed in three major steps. First we shall point out how thinking in terms of natural rights is radically different from thinking in terms of the Natural Law. Secondly we shall argue that Western moral and juridical thought is to-day divided in two different traditions precisely along the line between thinking in terms of natural rights and thinking in terms of Natural Law. Thirdly we shall consider Professor Black's attempt at reconciling the two traditions, hopefully showing that while her argument is not in itself successful, it is not necessarily misconceived. We shall then close discussion with a sketch on how we could pursue Black's ideas a

1. Virginia BLACK, "On Connecting Natural Rights with Natural Law", *Persona y Derecho* (Vol. 22) 1990, pp. 183-209.

little further so as to show that the modern language of natural rights is perhaps deep down nothing but a way of applying the more fundamental and primary notion of Natural Law, whereby the division of traditions may turn out to cover a fundamental conceptual unity, after all.

In order to see why natural rights perhaps are not a universally valid moral or juridical notion, we shall begin by having a brief look at Western and non-Western approaches to the natural rights of individuals. In that context it will be argued that a broad dividing line can be drawn between Western and non-Western juridical thought with reference to radically different conceptions of what an individual right consists in. These conceptions, I will argue, quite clearly depend on a fundamental difference about the concept of freedom, a concept essential to any understanding of individual rights. By and large, several non-Western cultures understand freedom as a circumscribed freedom which consists in being free to do the right thing, whereas the modern paradigm of Western thought conceives of freedom as a freedom of being at liberty to do what one will. To this difference corresponds a similar difference in the content ascribed to the notion individual right: For the Western mind, an individual right is essentially a subjective right to be free from constraint. For many a non-Western mind an individual right can be nothing but that which is right for the individual; and as we shall see, what is right for an individual is not that he be at liberty to do whatever he will, but that he, of his own free will, complies his will to given constraints against doing the unsuitable or unreasonable thing. An individual right, on such a view, is a right to do what is appropriate for one to do. Where all this can be quite compatible with a notion of Natural Law, the applicability of the Western concept of natural individual rights is problematic in that context.

But the division is not merely between a Western paradigm and several non-Western cultures, but also between different Western moral and juridical traditions: one important tradition of Western

thought joins in fact ranks with the non-Western traditions where the notions of freedom and individual right are concerned. In one way this tradition can be characterized as the Catholic tradition, as the Catholic doctrine with its emphasis on the virtue of charity has for a long time been its valiant champion. In another way it can be broadly characterized as the Aristotelian-Thomasian tradition, as it builds on the moral rationalism of Aristotle and St. Thomas Aquinas. This tradition, while it must with all reason be considered as the mother of all theories of the Natural Law, faces great difficulties in incorporating the notion of individual natural rights in its conceptual apparatus[2]. The other Western tradition, which today dominates the international discussion, can in one way be characterized as the utility tradition, with its emphasis on things secular, and on the acquisition of good things rather than on pesonal virtue. It can also be called the liberty tradition, as it places utmost importance on individual liberty, and precisely on the liberty of the individual will, whereby it is a voluntaristic rather than a rationalistic approach to morality and justice. Where this tradition has difficulties with the notion of Natural Law, it is the very cradle of all ideas about natural human rights. The two traditions differ so radically on so fundamental questions that it is difficult to see how they could be mutually compatible in the way proposed by authors who wish to argue that natural rights are to be considered as part of the very essence of the Natural Law itself[3].

Nevertheless, Virginia Black is convinced that even if natural rights clearly are not equivalent to the Natural Law[4], the two notions are connected to each other. The general outcome of her discussion is that although one cannot be sure that there is a

2. Even if it must be noted that the official Catholic church has by now accepted the notion of natural human rights as part of its social doctrine.

3. As Black points ot, many authors have claimed that natural rights are part and parcel of the Natural Law, without even trying to offer a solid foundation for their claim, *vide* p. 200 pp.

4. *Vide* p. 187.

conceptual connection between natural rights and the Natural Law, there are strong indications of one: the Natural Law perhaps provides for the true content of natural rights, which again are a way of putting the Natural Law into actual effect. I shall argue that Black's assertion is basically correct, but that it fails to fully appreciate one fundamental difference, a difference more essential than Black seems to acknowledge, between a natural rights ideology and a Natural Law ideology. Therefore I do not necessarily share Black's belief that the best way to teach the citizens to understand and follow the Natural Law is to teach them that it is the growing ground for their natural rights.

1. "NATURAL RIGHTS" OUT OF PLACE

One of the recurrent features of to-day's political discourse is that Western spokesmen call for more natural, or human[5], rights in the non-Western world, while many non-Western countries pay lip-service to the modern human rights ideology but continue to violate the Western conception of how they ought to be enforced. A common explanation for this, in the Western press and public opinion, is that these countries are underdeveloped in this precise respect: they are too poor, too uneducated, too uncivilized, too primitive, too traditional to be willing and able to respect the natural rights of their citizens. The patent solution that goes with this explanation is that the West should teach them to value, cherish and respect human rights, because it is for their own good[6]. I do not believe this to be the right (sic) solution. Quite on

5. Here I shall assume that "natural" and "human" rights are, for most practical purposes, synonymous, even if the two notions can be conceptually distinguished from one another.

6. A typical representative of this way of thinking is Asbjørn *Eide*: Ihmisoikeuksien väliset suhteet ja ihmisoikeuksien opettaminen, in *Kansain-*

the contrary, the conceited West should realize that it has something important to learn from those non-Western civilizations which have valid reason for holding that the concept of natural rights ought not to be adopted, at least not in its paradigmatic Western sense, because it is radically alien and possibly delapidatory to their own integral worldview and morality[7]. In plain words, let us assume that there is some substance, and not mere jealous opportunism and arrogant self-sufficience, to back up the words of a non-Western spokesman when he points out to the unreceptive Western audience that their way of understanding the rights of the individual human being have no place in his country.

As Abraham Kaplan points out[8], we should not begin with comparing our theory with their practice, or their theory with our practice, but with comparing our theory with their theory. Only if we find one of the theories better than the other, can we proceed to demand that those with the worse theory forsake it and conform their practice to the better one. In what follows, we shall have a brief look at a few theories of human nature and society which give reason to question the predominant Western notion of individual

väliset ihmisoikeudet (ed. Marjut Helminen & K. J. Lång), Lakimiesliiton kustannus, Mänttä 1988, pp. 35-53.

7. Cf. S. Prakash SINHA, "Human Rights: A Non-Western Viewpoint", *ARSP* LXVII (1981), pp. 76-91, who in principle accepts the desirable idea of universally valid human rights but questions what he calls the "single-catalogue approach", i. e. a way of approaching the problem via the false assumption that one single list of human rights, viz. the one agreed upon by the West, is right and there is only one right, i. e. Western, interpretation of it. Sinha sees three alternatives: (i) leave most of the world out of the human rights project because it cannot accept the one right catalogue; (ii) force those who cannot of their own will embrace the one right catalogue to accept it willy-nilly; (iii) realize that different cultures have legitimately different notions concerning what it means to set people free, and consequently allow different countries to act on their own interpretation of what natural rights consist in. See p. 88 pp.

8. Abraham KAPLAN, "Human Relations and Human Rights in Judaism", in *The Philosophy of Human Rights. International Perspectives* (ed. Alan S. Rosenbaum), Aldwych Press, London 1981, pp. 53-85, see p. 53 p.

natural human rights, or at least its prevalent status as the paradigm of international moral discourse. The views I will present are of a necessity simplified, perhaps therefore even distorted, but even as such they will show the essence of what makes the human rights approach to political morality a misfit in several cultural and philosophical contexts. We shall first look at the distinctly non-Western worldviews of Islam, India and China, whereby we shall identify the crux of the difference between the West and the East. After that we shall take up certain traditional components of Western thought, so as to show that the difference between East and West is also a difference within the Western civilization.

China

If we look at the Chinese worldview, we find three major factors which have given form to it: the Tao, the Buddha, and Confucianism. Where Taoism is perhaps more interested in the metaphysical unity and harmony of all being, Confucianism focusses on the more practical matter of harmony between different kinds of persons, and Buddhism circles around the prospect of losing one's lower self and realizing one's true Self as one becomes a Buddha[9]. But all three have something very important in common, viz. the central place the notion of harmony enjoys in each doctrine, be it harmony with the cosmos, with nature, with other people, with oneself[10]. As a consequence, right action for a Chinaman is harmonious action, action which seeks reconciliation,

9. *Vide* Peter K. Y. WOO, "A Metaphysical Approach to Human Rights from a Chinese Point of View", in *The Philosophy of Human Rights* (ed. Alan S. Rosenbaum), Aldwych Press, London 1981 (pp. 113-124), p. 114 p.

10. Alongside with WOO, *op. cit.*, *vide* S. Prakash SINHA, "Human Rights: A Non-Western Viewpoint, p. 80 p.

peace, common acceptance and everyone's happiness[11]. Hence one ought not to assert oneself in order to seek one's own good or one's own right at the expense of others, not even if one were "right", as it were: the primary goal of resolving conflicts is to restore harmony, not to give each his right. Therefore in a conflict situation all parties should strive to find fault in themselves, rather than in their adversaries, they should seek compromise and make concessions, rather than demands, and accept mediation, not adjudication, by someone else[12]. To resort to the law is shameful: as Sinha puts it[13], law is for "the morally perverse, the incorrigible criminal, and the foreigner who is alien to Chinese values"[14]. What is right is not at all important in comparison to what is proper, or appropriate, within the relevant group and in the particular kind of relationship[15].

11. WOO, *op. cit.*, p. 119; SINHA, *loc. cit.*; *vide etiam* Louis HENKIAN, "The Human Rights Idea in China", in R. Randle EDWARDS~Louis HENKIN~Andrew J. NATHAN, *Human Rights in Contemporary China*, Columbia University Press, New York 1986 (pp. 7-39), p. 21.

12. SINHA, p. 81.

13. *Ibidem.*

14. Cf. David B. WONG, *Moral Relativity*, University of California Press, Berkeley and Los Angeles 1984, at p. 198 pp., where the author argues that Taoism urges people to "forget" strict and rigorous moral rules so as to be able to approach moral conflicts in a way better adapted to the particular circumstances.

15. Especially the central rôle of propriety, as opposed to justice, is also characteristic of the Japanese way or looking at things, which in many respects owes to a heavy Chinese influence. *Vide* SINHA, *op. cit.*, p. 83 p. Of course, the hold of traditional thinking on the Japanese is to-day not quite so strong as on the Chinese, and it may be questioned if Sinha overstates his claim when he says that "the law (in Japan) ... governs a very small segment of social life, ... namely middle class individuals fashioning their relations on the basis of freedom and liberty". But surely the old way of life is still predominant, and recent developments in the world, looked at from a Japanese perspective, may give reason to think that the latter-day Westernizing trend can be about to break.

Moreover, A Chinese person is always what he is because he belongs to given groups and has a given status in each one of them. Individuals live their lives through others, they exist for the group, and they cannot lead a life independent from family and community[16]. It follows from all this that humility and compassion are the good characteristics of a human being: one must accept one's status and the duties that come with it, and one must always pay attention to the feelings of others. Duty is the primary moral category: according to the Four Steps of Confucius one has, first, the duty to cultivate oneself in virtue, secondly one has the duty to build a harmonious family, thirdly, if one has a status of authority, one has the duty to participate in the harmonious government of the people, and finally one has, if one is the Emperor, the duty virtously to govern the world for greater peace and harmony[17]. Thus duty to provide for others, according to the status one occupies[18], rather than right to have and take, is the centrepiece of Chinese morality. How can a Western notion of inalienable individual rights, possessed and exercised against others and at the expense of others[19], fit such a context where, as Woo points out[20], "freedom to do what one likes (is) translated into the freedom to do what one does not like to do when a higher goal is to be obtained by a concern with the welfare of others"?

India

In India, duty is also primary to rights. The Hindu world builds on a hierarchy of social groups where each kind of group and each

16. WOO, p. 119 pp.
17. WOO, p. 116.
18. SINHA, p. 81.
19. *Vide* Andrew LEVINE, "Human Rights and Freedom", in *The Philosophy of Human Rights* (pp. 137-149), p. 137 & p. 141 pp. where the author suggests that the predominant liberalistic notion of freedom tends to reduce "others" to mere instruments to the ends of the agent.
20. p. 121.

kind of relationship has its own rules of conduct defining the duties of a person in such-and-such a position. According to the Dharma, citizens have their civic duties, members of a given caste have their own duties, members of a family have their duties to the family, and non-Hindus have a different set of duties[21]. Group membership is decisive, not individuality, and the basic unit of society still remains the lineage, or "joint-family"[22] comprising several generations and also collateral relatives on the male side. Yet the Indian mind seems to be less tied to particular considerations and immediate circumstances than the Chinese: it has a strong bent to a rational universalism, grounded in the strong Hindu philosophical tradition.

The Indian universalism is reflected in the writings of authors like here quoted S. Prakash Sinha, and Ishwar C. Sharma, who advocates what he calls "comprehensive humanism" as opposed to Western religious and secular philosophies which look at human nature from overly restricted and even schizophrenic viewpoints[23]. What is important for him is the whole man, not just his social, political, economic, or religious part, and a man is whole when he is at harmony with himself and the world, i. e. when he is a good and benevolent person[24]. Respect instead of rights is the password of comprehensive humanism: before you can claim a right to live you must respect life, before you can claim a right to property you must respect property, before you can claim a right to express your thoughts you must respect everyone's thoughts. Out of respect grows a will to fulfil one's duty to others voluntarily. If that happens, one's personality becomes integrated, and one reaches true freedom, the freedom of mind unfettered by selfish and

21. SINHA, p. 87.
22. *Ibidem*, p. 88.
23. Ishwar C. SHARMA, "Human Rights and Comprehensive Humanism", in *The Philosophy of Human Rights*, pp. 103-112.
24. SHARMA, p. 110.

improper considerations[25]. It is doubtful whether such a freedom could properly be promoted by a conflict-oriented Western notion of natural individual rights which demands that rights-owners defend their own claims first, even at the expense of others.

Islam

In Islam, too, duty is paramount to right[26], perhaps even more markedly than in China and India. After all, the very notion of Islam signifies submission to the Divine will. As Seyyed H. Nasr points out, the Islamic concept of freedom does not consist in a freedom to do what one likes or wishes to do, but in a freedom "from all external conditions, including those of the carnal soul..., which press upon and limit one's freedom. Pure freedom belongs to God alone; therefore the more we are, the more we are free"[27]. In other words, freedom means godlike independence from the world, and men realize their freedom by becoming more adquate images of their Creator. Nasr continues: "To rebel against our own ontological Principle in the name of freedom is to become enslaved to an ever greater degree in the world of multiplicity and limitation"[28]. Rights, in order to make full sense in this context, can hardly be like their Western prototypes, set on having things rather than on being what a human being is to be, i. e. a fully human person.

The Islamic ideal of human society is also communitarian rather than individualistic: according to one of the fathers of arabic social philosophy, Al-Farabi, who wrote in the 10th century and was influenced by both Aristotle and Plato, the ideal state is a

25. *Ibidem.*

26. *Vide* SINHA, p. 86.

27. Seyyed H. NASR, "The Concept and Reality of Freedom in Islam and Islamic Civilization", *The Philosophy of Human Rights*, (pp. 95-101), p. 96.

28. *Ibidem.*

coordinated organism where each member has a place and a job to do, and which job it is everyone's duty to perform[29]. Later, Ibn Khaldun, who in the 14th century entertained "realistic" ideas somewhat reminiscent of Macchiavelli, argued that the reason for the destruction of overripe states was their degeneration due to easy life in great welfare which delapidated the nomadic communitarian virtues that still held the young and victorious states tightly together[30].

Islam has a greater belief than the other oriental cultures we have considered in the importance of Law, necessary for the creation and maintenance of social coordination. But the Islamic lawyers find obligation and duty primary to rights, and for them, the fundamental task of the law is to set men free from the world, free in an inner sense, rather than in an outer sense of being free in the world[31]. On the other hand, Islamic theologians and philosophers are often at a difference concerning the question of human freedom: some theological schools are deterministic, whereas philosophical authors like Avicenna, Averroës and Avempace, join the Greek tradition which emphasizes the freedom of human will. But even for the philosophers the ultimate warrant for human freedom is submission to the Divine will which liberates men from the close confines of their carnal passions[32]. As a consequence, whatever rights individual men may have, they must be for the purpose of gaining immortal beatitude rather than wordly well-being. That end is quite alien at least to the liberalistic brand of Western natural rights ideology.

29. *Vide* Abdulkader IRABI, "Zur Geschichte und Gegenwart arabischer Sozialphilosophie und Soziologie", *ARSP* LXVII (1981), pp. 176-196, p. 178 p.

30. *Vide ibidem*, p. 181 pp.

31. NASR, p. 97.

32. *Ibidem*, p. 98 p.

Summary

To close our discussion of extra-European cultures[33] we shall try to formulate what is in common between them but at a difference with the predominant Western natural rights thinking. Sinha sees three components[34]: 1) The Western human rights ideology is individualistic, whereas the non-Western ideologies are group-oriented or outright communitarian. 2) The Western human rights ideology believes in the primacy of rights, whereas the non-Western ideologies consider duty and obligation the centrepieces of morality. 3) The way of resolving conflicts according to the Western human rights ideology is to make legal claims and resort to legal adjudication, whereas the non-Western ideologies seek harmony and reconciliation through mediation, education and repentance. Another way of putting the same thing would be to say that the West concentrates on having and getting whatever is there to grab according to the rights one possesses much in the same way as one possesses one's private property; whereas the East is primarily concerned with being or getting to be in a proper state of harmony with one's self, with one's group, with one's government, with nature, and with the universe.

I will not propose to defend the claim that the East is right and the West is wrong. Suffice it to say that clearly the East has a reasonable case, and the West is obliged to ground its claim to ideological supremacy with a substantial metaphysical and moral argument. It is not enough to point a relentless finger at "traditionalism" and claim that as the non-Western doubts about

33. It would be instructive to look at Africa, too, where the general judgment has it that the local cultures are highly family-oriented, communitarian, and look for reconciliation in conflict situations rather than for a judicial statment of who is right and who is wrong. *Vide* SINHA, p. 84, p. But African tribes, each with its own tradidions and its own morality, are a legion, wherefore it is even more out of place than it is where China, India and Islam are concerned, to make sweeping generalizations about them.

34. SINHA, p. 77 and p. 88 pp.

natural rights are traditional, they are for that same reason irrational and unacceptable as valid arguments in the international human rights discourse. As Louis J. Munoz points out, it is a post-Weberian prejudice to hold tradition irrational: traditions are not followed blindly, they are continuously accepted (and modified) because they are continuously found an adequate way of coping with the problems confronted by the members of the tradition[35]. The difference between adopting a traditional stand and a Western "scientific" stand is that the former is a personal choice reflecting a tacit rationality, where the latter is an impersonal choice reflecting an explicit rationality[36]. Besides, what more can the Western rationality with is natural rights ideology be but – a tradition among other traditions.

2. THE DIVISION OF THE WEST

At the core of the different cultural approaches to human normativity is the concept of freedom: morality and law become necessary only because human beings are free to act according to their personal choice. Different understandings of the concept of freedom make up major divisions between the different outlooks to life. The internationally predominant Western natural rights tradition builds on a notion of freedom which can be loosely characterized as liberal: not libertarian, or liberalistic in a narrow sense, but liberal because of its emphasis on freedom defined as a state of being at liberty to act as one will. On this conception, freedom is a concept defined with primary reference to the will: one is free when one can exercise one's will at liberty, i. e. when one can without undue restraint do what one wants or needs to

35. Louis J. MUNOZ, "The Rationality of Tradition", *ARSP* LXVII (1981), pp. 197-216, *vide* p. 207 p.

36. *Ibidem*, p. 207 pp.

do[37]. It is a natural (sic) corollary of accepting such a conception of freedom that one also accepts the view that in order to realize one's freedom one ought to have the right to do what one will without undue heteronomous normative restrictions or other external hindrances. Autonomy, in other words, consists in one's fundamental right to act at will, whatetever it is one may will, as long as it will not unduly affect the like freedom of others. It is a right to be let alone by the others, to make claims and litigate when one's rights are violated, to defend one's existing rights and to acquire new ones, to demand respect from others. The basic moral assumption behind it is that if one wants freely what one wants, one's will merits moral respect, whatever its object my be: therefore it is morally not only admissible but also *prima facie* right and even laudable that one does what one wants. A myth built up to support this assumption is that all human beings equally have a certain natural worth or dignity, which their acts of will reflect and realize.

The non-Western viewpoints reviewed above represent a different understanding of the concept of freedom. If we look away from the different nuances, which are not insignificant, we can discern something essentially common in the way China, the Subcontinent, and Islam, look at freedom: freedom is not to be realized by being at liberty to act as one may wish, but by being free to act in an appropriate manner, i. e. by freely submitting to the constraints put on by one's social position and circumstances. In this sense, freedom consists in a free acceptance of the fact that one cannot do what one may want or need to do just because one

37. A prototype example of a proponent of such a conception of freedom is Carol C. GOULD, *Rethinking Democracy. Freedom and social cooperation in politics, economy, and society*. Cambridge University Press, Cambridge 1988, *vide* especially p. 43 pp. where she levels her argument against what she calls "traditional conceptions of freedom". For a comment, *vide* RENTTO, *Match or Mismarriage? A Study on Ontological Realism and Law*. Acta Societatis Fennicae Iuris Gentium CI, Helsinki 1992, p. 163 pp.

wants or needs to do so, because there are good reasons against it. In this loose sense[38], the non-Western traditions can be said to build on a notion of freedom primarily defined by the reason: one is free when one submits to good reasons. The freedom one then enjoys is not freedom to act and to have, but freedom to be human, i. e. independent of the subhuman world, liberated from uncontrolled and unreasonable passions which can enslave the human soul and undo the position of man as master over himself. Man has a place and a mission within the universe, a task to fulfil, and so as to be free, the individual person must submit to that position, accept the mission, and undertake to accomplish the task. In this sense freedom consists in an autonomous submission to an order: by submitting to it one legislates for oneself the law which governs the universe. For this reason we can loosely characterize the common denominator of the non-Western traditions as a Natural Law tradition.

The West has also a long history of thinking in terms of Natural Law rather than natural rights, which are a relatively novel invention[39]. Next it will be our task to investigate the Western Natural Law tradition in order to see how compatible it is with the Western natural rights tradition. The notion of Natural Law lives in the West most strongly together with the Christian element of the occidental tradition, influenced by Judaism as well as by Platonism (through Augustinianism) and Aristotelianism (through Thomism). The Catholic church has long been an adamant defender of Natural

38. Loose because e. g. Islam, as we have pointed out, has a voluntaristic tendency to express the good reason not to act as one wants in terms of God's will rather than reason.

39. *Vide* e. g. Ralph MCINERNY, "Natural Law and Natural Rights", *The American Journal of Jurisprudence*, 36 (1991), pp. 1-14, where the author without preliminaries proceeds from the assumption that there are two Western traditions: the natural law tradition and the human rights tradition.

Law doctrine, reluctant to accept a human rights doctrine with a whole heart[40]. That there is even to-day a lively discussion among Catholic and non-Catholic philosophers on whether it is appropriate to infer natural human rights from the Natural Law, or whether the two notions are incompatible or at least independent from each other, shows that there is a substantial issue here to be settled, just as it shows that the West is not unanimous in its worldwide programme for an undiscriminate promotion of natural human rights[41].

The gist of the Catholic Natural Law philosophy is that God has in creation assigned to each being, including man, its nature. This nature is normative in the sense that it defines the ideal perfection of the being in question, which it is to seek during its existence so as to fulfil God's creation for its own part. In order to be a good being of its kind, it must act according to its nature, i. e. seek its own kind of perfection which differentiates it from all other kinds of creatures and reflects its specific place and task in the grand order of the universe. A standard argument forwarded by those Catholic theologians and philosophers who argue for human natural rights within this scheme is that man was created to the image of God, wherefore he possesses a share of God's dignity: each man has an intrinsic worth, he is an end in himself, and

40. In 1790, pope Pius VI condemned the French declaration of human rights. Only in 1891, pope Leo XIII affirmed the notions of human dignity and human rights in the encyclical *Rerum novarum*, see Reginaldo M. PIZZORNI, "Persona umana e diritti dell'uomo", *Persona y Derecho*, 28 (1993) (pp. 85-119), p. 91. To-day, the official church speaks about human rights quite unreservedly, for an example see *ibidem* p. 85. Nevertheless, the church is aware of the problems of the liberal conception of human rights, and her understanding of human rights is necessarily different, due to the fact that their foundation is explicitly sought in God's creation.

41. For some deviant views, *vide* Virginia BLACK, *op. supra cit.*, p. 183 pp.

therefore he is entitled to personal respect and to an individual freedom to make his own life[42]. A similar argument is, quite naturally, invoked by Jewish human rights theorists[43].

A great believer in the human rights within the Natural Law tradition was Jacques Maritain who more or less thought that the modern human rights catalogues like the one in the Universal Declaration of Human Rights of 1948 were the proper content of the Natural Law in modern times[44]. Another author who claims that natural rights doctrine simply is the appropriate Natural Law theory is Felicien Rousseau[45]. A third spokesman for at least the language of natural rights within the Natural Law tradition is John Finnis[46]. But he makes an important difference between substance and language: for him, the natural rights are not the Natural Law, but, as Mc Inerny points out, he thinks we can more eloquently, more precisely, and more discriminately "say all we have to say using rights talk alone"[47]. To Finnis we shall return at the close of this essay.

Most prominent among those who deny every connection between the Natural Law and the modern natural rights are Michel

42. *vide* e. g. R. J. HENLE, S. J., "A Catholic View of Human Rights: A Thomistic Reflection", *The Philosophy of Human Rights* (pp. 87-93), p. 88 p.; *etiam* PIZZORNI: *op. cit.* p. 116 pp.

43. *Vide* Abraham KAPLAN, "Human Relations and Human Rights in Judaism", *ibidem* (pp. 53-85), p. 54 pp.

44. Maritain's statement is to be found e. g. in MARITAIN, *Man and the State*, The University of Chicago Press, Chicago 1951. For brief comments, *vide* MACINERNY, *op. supra cit.* p. 4 pp., and BLACK, *op. cit.* p. 201 p.

45. Felicien ROUSSEAU, *La croissance solidaire des droits de l'homme: un rétour aux sources de l'éthique*, 1982, commented by MCINERNY, *op. cit.* p. 9 p.

46. John FINNIS, *Natural Law and Natural Rights*, Clarendon Press, Oxford 1980, p. 198 pp.; *vide etiam idem*, Natural Inclinations and Natural Rights: Deriving "Ought" from "Is" According to Aquinas, in *Lex et Libertas. Freedom and Law According to St. Thomas Aquinas* (ed. L. J. Elders S. V. D. & K. Hedwig), pp. 43-55.

47. MC INERNY, *op cit.* p. 8.

Villey and Leo Strauss who hold that the modern natural rights doctrine is essentially different from the classical theory of Natural Law, being a result of a radical shift in what is meant by the concept of "right". Villey argues that "right" in the classical Natural Law doctrine means more or less "the right thing", a meaning essentially different from "right" as in human rights[48]. Strauss, on the other hand, sees the natural rights as something essentially Hobbesian, requiring the assumption that the basis of all morality is the human desire for self-preservation, whereas the classical Natural Law had nothing to say about any individual rights[49].

Arguments like Villey's and Strauss' appeal to historical purity of tradition. More interesting for our purposes are arguments forwarded by authors who see that Natural Law and natural rights are different things, but nevertheless believe it worth while to make an attempt at joining or reconciling the two notions. In this group we have the official Catholic church, together with Father Henle and Professor Pizzorni. A scrutiny of their way of circumscribing the scope of natural rights is quite instructive as it reveals just how far the Natural Law tradition is able to accommodate the modern notion of natural human rights.

Henle points out that human rights must be put "into the background of human relationships"[50]: if one were alone, what significance would rights have? What is more, rights are legal concepts and fictions, designed for a practical purpose of dealing with certain public aspects of human relationships. Rights identify and crystallize these aspects and make them more susceptible of being organized in an orderly way. But they should never be separated from the fundamental context of interpersonal relations and their equitableness: they must always be considered as expressions for the more basic notion of interpersonal justice, which, again, covers the entire field of human intepresonal

48. *Vide ibidem* p. 1 p.
49. For a discussion, *vide* BLACK, *op. cit.*, p. 183 p.
50. HENLE, *op. cit.* p. 89 pp.

morality, the morality about things and actions. This public sphere of morality demands that different persons be in a right relationship to one another. This relationship is reciprocal, and proportionate. In other words, people are in a right relationship when they are in a proper proportion to each other. Against this background, rights must be seen as rights to right proportions between men, not as rights to things or actions as such. The right proportion is not an equality of amounts, but it consists in the respective persons occupying the positions that are rightfully theirs. Thus different kinds of proportionalities obtain between citizen and state, individual and individual, individual and community. And what is important, there is no principial conflict between the good of the individual and the good of the community: the true common good is the good of each and all, and the true good of each and every one is good for the community. If rights are to be used aright, they must be aimed at the "objective *iustum* –the right relationship between men with reference to goods and actions".

Where Henle's key concept is "right relationship", Pizzorni's is "person": the human being is a person in analogy to the Persons of the Holy Trinity, and the dignity of the human person derives from its similitude to God in its rationality and freedom of will[51]. The Natural Law is an objective order giving man his rational and free nature, enjoining him to act aright, i. e. according to his nature[52]. On the contrary, the modern secular conception of human rights is subjective: man is the creator of the order, not its subject. In order to understand rights aright, this subjective approach must be surpassed. This can only be done if we anchor human rights is God's eternal law which defines the world order and all the different natures of the things it encompasses[53]. But even if it is God who defines man, among other natures, and not man himself, man's freedom is not diminished: human autonomy does not

51. PIZZORNI, *op. cit.*, p. 87 pp.
52. *Ibidem* p. 98.
53. p. 99.

consist in a rejection of all "heteronomus", norms, but in one's free acceptance of the Natural Law, whereby the human person is not enslaved but liberated. And each person, as a participant of the divine providence, is himself responsible for his own liberation, *sibi ipsi providens*[54]. As a consequence it is the responsibility of each and every one to make God's law one's own, to legislate it to oneself. In this precise sense, the individual person is "a law unto himself", as St. Paul states. This law is identified by the conscience in its judgments[55]. Thus man participates in his own creation by discovering his own essence and growing to be more fully human and with a more perfect similitude to God as he realizes his nature by his own free will. In this way he grows in his free rationality, and becomes an authentic autonomous person in the full sense of the word[56]. Now persons are not for the society, but society is for the flourishing of personhood[57]: The point of organized society is the common good, which is the good of each and every citizen. Therefore the state ought to serve the purpose of facilitating the growth of individual citizens to full personhood. This can only happen if the citizens are fully allowed to assume their responsibility fo their own lives. For this reason, the state as well as the fellow citizens owe respect to the individual person and his dignity as co-author with God. Rights are corollaries of this duty to respect the individual person who, and who alone, can bear responsibility for his own action for the common good of all. For this purpose, and for it alone, human rigths "individuate elements in which they reinforce the vigor and efficacy of the very tradition of Christian values"[58].

These two arguments, while they explicitly support natural human rights, reveal a strong apprehension of using the notion of

54. p. 100 p.
55. p. 102.
56. P. 105.
57. p. 107 pp.
58. p. 115.

natural rights in an inappropriate manner. If it is to be understood correctly it must be subordinated to more fundamental moral considerations: rights cannot be ultimate grounds for morality, as the ultimate ground is human nature, created by God. And it is part and parcel of this nature, social and rational as the tradition has it, that individual human beings enter into relationships with each other. In these relationships each individual has a rôle, and justice requires that each individual occupies the rôles that properly belong to him in right proportion to those other individuals with whom he enters into relationships. Rightness is right proportion, and one's individual rights must be seen against this very background as rights to actualize the right proportion, not against others but to them[59]. Morally fundamental in this context is that each individual human being is responsible for himself: he enjoys moral freedom and must provide for himself, make his own life and give form to his own personality by making autonomous moral choices which grow into a habit of virtue or vice. This responsibility entails a moral obligation to act according to one's nature if one is to become a fully human person, i. e. to actualize the full likeness of God imprinted on one in creation. It is up to each individual to do so for his own part. This, as Pizzorni would put it, is a duty to God from which the human rights follow, and because of it those rights are not our private property to use as we please but inviolable obligations towards ourselves, our neighbours and our creator[60]. Duty, obligation, and responsibility, then, take precedence before rights. And even when we owe respect to each other in our mutual capacity of becoming fully human persons, it is not essentially the fact of being respected that contributes to a persons's moral growth but the fact that he respects himself as well as his fellows as living images of God. It is morally more laudable

59. To give a striking example: if proportionality requires that someone who has committed a crime is to be punished in a certain way, it is his right to be punished because it is the right thing for him.

60. *vide* PIZZORNI, *op. cit.* p. 108 p.

to suffer wrong in humility and charity than to rise in revolution or to cry out loud for one's rights[61].

The Catholic Natural Law tradition is clearly uneasy about natural rights. The Catholic starting points, with their emphasis on "right relationship", "proportionality", "responsibility" and "duty" are quite close to the non-Western traditions we have considered. Like them, the Catholic Natural Law tradition holds that man is part and parcel of a universal order to which he is subject. Like them, it believes that the essence of human freedom consists in one's free submission to the dictates of natural reason, not in one's being at liberty to do whatever one may happen to wish[62]. Therefore it meets with the same problems as the Chinese, Indian and Islamic traditions do when its children seek to embrace the modern notion of human rights. Nevertheless, many have welcomed it as part of the very teaching of the Catholic church. Are those who argue for human natural rights as requirements of the Natural Law being inconsistent when they seek to sustain both traditions at the same time? To this question Virginia Black has answered a cautious "no", which it is next our task to evaluate.

61. Pizzorni (p. 117 p.) quotes a document entitled "Orientamenti per lo studio e l'insegnamento della dottrina sociale della Chiesa nella formazione sacerdotale (30 dicembre 1988), n. 4, published in a Supplement to "L'Osservatore romano", June 28 1989: "(i diritti umani) lo ha fatto però non nel contesto du un'opposizione rivoluzionaria dei diritti della persona contro le autorità tradizionali, ma sullo sfondo del Diritto iscritto dal Creatore nella naturale umana". – *Vide etiam* MACINERNY, *op. supra cit.* p. 12 pp., which is more openly critical of the "conversion" of church representatives to a modern pluralistic, claims-oriented human rights ideology.

62. Vide Horst SEIDL, "Sittliche Freiheit und Naturgesetz bei Thomas angesichts des modernen Gegensatzes von Autonomie und Heteronomie", *Lex et Libertas. Freedom and Law According to St. Thomas Aquinas* (ed. L. J. Elders S.V.D. & K. Hedwig), Pontificia Accademia di S. Tommaso, Libreria Editrice Vaticana, Città del Vaticano 1987, pp. 113-124, where the author explains how the Law of Nature is a natural condition for, and not a heteronomous limitation to, moral freedom

3. PROFESSOR BLACK'S ARGUMENT: A BRIDGE OVER THE DIVIDE?

Not herself a member of the Catholic Natural Law tradition, Professor Virginia Black has in this journal[63] outlined an unpretentious defense of an important connection between natural rights and Natural Law, which is noteworthy and interesting precisely because it is so modestly devoid of grand vocabulary and solemn invocations to self-evident truths. Her starting point is the insight that natural rights and Natural Law clearly are different things: The Natural Law is a doctrine of duty and obligation whereas natural rights are an "inalienable possession with which (we) can do things"[64]. The two notions are not identical, as it is obvious that duties and rights do not always entail or require each other[65]. Therefore we must accept that Natural Law and natural rights are, in the abstract, conceptually distinct from one another. But despite this they may have a lot in common which makes them a good match.

Black puts forward six different criticisms of a supposed connection between natural rights and Natural Law. The first criticism points out that a Natural Law doctrine must always be community oriented, whereas the natural rights ideology circles around the individual. Black's answer is that rights are social, too, because they presuppose the presence of others, wherefore natural rights are necessarily incompatible with Natural Law only if they are based on a Hobbesian egoism which reduces morality to a mere instrumentality for self-preservation[66]. This, according to Black, is not the case where the predominant natural rights doctrine is concerned.

63. BLACK, *op. supra cit.*
64. BLACK, p. 187.
65. p. 188.
66. p. 189 p.

A second criticism appeals to the latter day extension of rights to include specific entitlements to determinate things, which the Natural Law doctrine rather includes within the sphere of duty and obligation. At stake here are the so called positive rights to goods redistributed by the state. The scope and number of such entitlement-rights "have exploded out of all proportion and feasibility", Black concedes, but points out at the same time that conventional positive rights accorded by a state to its citizens should not affect one's consideration of the natural rights doctrine, a doctrine of universal morality. The positive entitlements can well be incompatible with the Natural Law, but this will not entail that natural rights must be so, too[67].

A third criticism can be construed with reference to the apparent fact that modern rights doctrine would seem to override our moral obligations, which puts traditional Christian charity and relief work into a danger of extinction: voluntary obligations cannot in the long run compete with legally enforcible rights. Black's answer seems to be that it is only natural that virtue cannot be legally enforced: wherever there is law, it must also compete with the voluntary virtue of its subjects. Nevertheless, even if the Natural Law doctrine holds the virtues dear, some of its basic tenets like "do no harm to others" are beyond any doubt legally enforcible[68].

A fourth criticism points out that rights are usually defined by the rôles of their carriers: a person in a given position has a given competence of rights. But natural rights must be something different, because they are claimed to be universal. Therefore the question rises if they can be properly rights at all. To this Black replies that rights can indeed only be perfet, i. e. securely enforcible and protected, when tightly connected with given individuals in their given rôles. Only positive legal rights can strictly speaking be such. But the fact that natural rights cannot be

67. p. 190 p.
68. p. 191 p.

perfect rights in that sense will not affect the chances of a natural rights doctrine to acquire the status of a moral doctrine with universal validity. And she continues to argue that a natural rights doctrine is patently useful as a way of judicializing universal moral considerations, i. e. of putting fundamental non-positive moral arguments in judiciable terms more readily susceptible of discussion and consideration in the courtroom[69].

A fifth criticism builds on the insight that a knowledge of what natural rights we may have will not tell us what is good for us. This may lead to an egoistic and immoral misuse of rights, which also contributes to a stready growth of selfishness, accompanied by a widespread acceptance of the idea that it is morally appropriate, laudable, even obligatory, to think and act for one's selfish interest because it is one's civic duty to stand upon one's rights. This goes directly against the aspirations of a Natural Law doctrine. Black retorts that, again, the pessimistic outcome claimed here cannot result from a natural rights doctrine alone, but only if it is combined with an undesirable moral attitude. The proper answer to the problem is not to discard natural rights but to invest in moral education, so that the carriers of natural rights learn to use them for doing the right things rather than for cultivating a wanton self-indulgence[70].

Finally, a sixth criticism has it that the natural rights doctrine unduly looks away from the divine origin of the natural morality, an origin supposedly essential to Natural Law doctrine. The obvious answer given by Black to this criticism is that already the history of ancient Greek philosophy shows that there is no reason why Natural Law could not be based on secular considerations. Indeed a great deal of its strength lies in the fact that it does not entirely depend on a supernatural crutch: the crux of the Natural Law is, after all, nature, not nature's author[71].

69. p. 192 p.
70. p. 194.
71. p. 194 pp.

I find most of the criticisms identified by Black important and valid in the sense that they point to significant problems which the natural rights doctrine must face and solve if it is to be taken seriously as a universally valid moral doctrine. I also find most of Black's rejoinders valid in the sense that they show the ways in which solutions to these problems can be found. For the purposes of this essay we shall leave the sixth criticism from religion as it is, well satisfied by Black's argument. To the subject matter of the fourth criticism from the imperfection of natural rights, which we will not evaluate more closely in itself, we shall return at the close of this essay. But criticism one, two, three and five are too easily dismissed by Black: I believe there is something in them she misses or overlooks. What it is will hopefully become clear as we consider the argument she proceeds to unfold in order to show that there is an important connection between natural rights and Natural Law.

Natural Law and natural rights have a lot in common, Black observes: they deal with the same things, they impose much the same moral constraints on action, they are both teleological at the core, seeking moral and intellectual improvement, both build on human autonomy, both restrict state authority, both lay a claim to immutability and universality of application, etc. But to have many things in common does not mean that the concepts in question are interchangeable, or that Natural law and natural rights are mutually necessary or otherwise follow from each other[72]. Yet Black believes that all the things the two notions have in common are fairly convincing evidence that their mutual relationship is more than accidental. Looking for binding evidence, she goes on to consider several openings.

Black begins with the argument that if the Natural Law is to work in a society, it requires that people be "free and rational to exercise their capacity for moral judgment". Now this freedom is

72. p. 203 p.

ostensibly guaranteed by the natural rights. Thus it seems to follow that these rights are a necessary prerequisite of the efficacy of the Natural Law[73]. Black refutes this argument quite correctly by pointing out that political freedom in the sense of freedom from undue restraint and oppression is not at all the same thing as the freedom required by the Natural Law, which is a freedom of the will to act according to reason. One need not live in a free society in order to be a good person and act aright. – Another opening for a strong connection Black finds in the implicit teleology of both the Natural Law and the natural rights: that they both aspire to a personal improvement of the members of society[74]. But even this approach, while it is clear that the natural rights can causally reinforce the Natural Law and facilitate its success, has a major shortcoming in that the causal relationship is merely contingent: from natural rights will not necessarily follow an improvement of morality and e. g. communal caring. As Black puts it, "it seems that something else has also to be in place ... that ... is not obviously or instantaneously available to us". This something else is the factor which makes us choose the right goals, as the natural rights in themselves "leave us free to choose our goals"[75]. The meaning of this last phrase is ambiguous: does it mean that we are free to choose between goals which are our goals with a natural necessity, i. e. between things naturally good for us, or does it mean that we are free to choose which things are good for us and which are bad? Is it our choice which makes things good for us, or are they good or evil independently of our choice? This key question strongly suggests that, contrary to what Black appears to believe[76], the natural rights tradition builds upon a human nature

73. p. 204 p.
74. p. 205 p.
75. p. 206.
76. *Vide* p. 203 where she simply asserts that both ideas are based on human nature. The question is, what kind of human nature they are based on, and whether it is the same nature in both cases.

which may be quite different from the one used by the Natural Law tradition, because it conceives of the human freedom in a very different way.

A third opening can be seen in what Black calls the Aristotelian mode of construing the Natural Law as the essential social constants of our associational life, e. g. natural justice. From this viewpoint it can be argued that where the Natural Law defines the obligations of the members of the political community as something we have a natural inclination to perform, the natural rights reflect the Natural Law and put it into operation as a moral law, protecting these natural inclinations from intrusion[77]. But again Black points out that a mere similarity of function will not of itself constitute a conceptual connection between the Natural Law and the natural rights. Instead, she sees a more promising approach in a fourth way of putting the problem: the Natural Law should be understood as directive of not seeking our own individual goals alone but also to help others to seek theirs. In this other-directed aspect of the Natural Law, respect for the freedom of others is essential, and this respect is readily definable as a respect for the natural human rights of one's fellows. In this way the natural rights become a function of the Natural Law, being an expression for it normativity. If so, natural rights are with no doubt fully compatible with the Natural Law.

Black is right to a point: it is quite sensible to claim that there is an important connection between Natural Law and natural rights because both notions circle around the concept of human freedom. A fundamental presupposition as well as the final goal of the Natural Law is human freedom, and the human rights help individual human beings to attain and to exercise human freedom. Therefore it is only natural to hold that the Natural Law enjoins us to respect and cherish the rights of man. In other words we have at hand a practical syllogism which concludes that if human beings

77. p. 206 p.

are to be free, it is practically necessary for us to hold that the Natural Law requires them to enjoy certain rights which we call natural or human. But if the syllogism is to be valid, the meaning of "freedom" must be the same throughout the syllogism. This condition does not necessarily hold.

"Freedom" as a presupposition of the Natural Law refers to the metaphysical notion of freedom as an ontological fact of the human nature: the human being is such that it is not, contrary to other beings, fully predetermined to any single goal or action. The make-up of human nature is simply such that it is up to each individual human person to make up his own mind as to what he is to do. Human rights cannot affect this fundamental freedom in any way whatsoever[78]. "Freedom" as the goal of the Natural Law refers to something else: that freedom consists in personal autonomy, i. e. in an actualized full freedom of the will, which from a different angle is equivalent to a full subjection of the will to the directions of right reason. If the practical syllogism is to be true, natural human rights must promote freedom in precisely this sense of personal autonomy. Whether they do, depends. If we give a new look at the objections so easily discarded by Black to the compatibility of natural rights with the Natural Law, we shall find that thinking in terms of natural rights has certain features which tend to block rather than help the actualization of full personal autonomy. Whether these tendencies can be removed, is arguable.

Black says that the predominant natural rights ideology is not Hobbesian and amoral[79]. But I believe she overlooks that thinking in terms of natural rights is ingeniously adaptable to the naturalistic morality which equates "good" with "what I want" or "what I

78. Even in the greatest stress and under the cruelest oppression and violence the individual person remains, on the level of his human nature, free to choose.

79. *Vide supra* at footnote 66.

need"[80]. If we think and speak in terms of natural rights it is only natural to join the concept to a view of morality where it is the very choice of an individual person which constitutes the goodness of an action or a goal. This is due to the way one is supposed to respect the rights of others: even if you do not agree with them that their choices are good ones, you ought to respect them because they are their own personal choices. This can lead to a deterioration of personal autonomy if the people learn to think that everything is good as long as it is their own choice, and they have a right to be left alone to act according to their free choices. Freedom in the sense of being at liberty to do whatever one may wish grows, while freedom in the sense of freedom from undue external and sensible affectations can diminish with the misuse of liberty. An ideology of natural rights tends, I am afraid, to contribute to an undesirable development like this.

Also, it is entirely correct to respect the choices of others because no one can, after all, make another person's choices for him. But there is a step as short as it is illicit from this correct consideration to a faulty moral conclusion, viz. that others ought to respect my choices whatever they are because they are my own choices. It is rather symptomatic of the human disposition that when moral problems are addressed in a language of rights, individual persons will think in terms of their own rights, rather than in terms of their obligation to respect the rights of others.

Black says that the natural rights are not like the positive entitlements to specific services or goods provided by the state for its citizens which can be at odds with the requirements of the Natural Law[81]. Even if this may be the case where the supposedly

80. According to Alasdair MACINTYRE: *Whose Justice? Which Rationality?*, Duckworth, London 1988, it is one of the important differences between classical and modern moral rationality that where the former said something was wanted because it was good, the latter says something is good because it is wanted.

81. *Vide supra* at footnote 67.

"true" natural rights are concerned, it is not necessarily so with all the different lists of human or natural or soldiers' or children's or women's rights, included in various declarations and international conventions. Whatever the case may be, it is certain that a natural rights ideology can encourage people to start thinking about their moral choices in terms of entitlements rather than in terms of obligation. That something like this has already happened in the "enlightened" West is beyond all doubt. It can easily be seen in the attitude of an average citizen of a modern welfare state towards the predicament of the less well-off fellow citizens: they are entitled to help and care by the government like everybody else, I pay my taxes like everybody else, why should I personally care for any of their specific needs? Perhaps from an American viewpoint Black cannot see the decline of charity and relief work[82] that has taken place over the past decades in other parts of the affluent West where interpersonal contact between those in need of help and those in a position to help has largely been replaced by an impersonal mediation of the state where those with plenty pay money to the government for further redistribution to those in need. Wonderful evidence of a decisive shift in the paradigmatic way of thinking that has taken place are letters to the editor of major and minor newspapers: it is striking how many people publicly demand the introduction of new and the protection of old rights and entitlements for different categories and groups of citizens like the unemployed, the homosexual, the parents of small children, the retired and others. What would they do to help an unemployed stranger, neighbour, or even a relative, if they had a chance? The nature of social solidarity has changed dramatically, and the sense of personal responsibility for the welfare of a neighbour in need has been replaced by a sense of political indignation at purported shortcomings of the faceless public society.

82. *Vide supra* at footnote 68.

If the obligation of the Natural Law to assume responsibility for the welfare of others is being outcompeted by the natural rights paradigm, the latter is profoundly incompatible with the Natural Law doctrine because it not only encourages people to think that what they may happen to want is good because they want it, but because it also takes away from the ordinary citizen his due opportunity to exercise charity and beneficence directly by himself. When the state assumes the rôle of all-round charity it robs the citizens of their chance to do something personally for the good of others as they learn to pass their responsibility to the shoulders of the anonymous community. If so, the citizens lose an important opportunity to practice virtue in their everyday lives. This again puts obstacles to the full actualization of their personal autonomy, as that autonomy consists, among other things, in a free subjection to one's moral obligation to those for whose welfare one is responsible. If an attitude according to which all have rights with regard to the state but none have personal responsibility for fellow citizens is ingrained among the citizenry, a serious moral deterioration of the entire society can be expected. Citizens will legitimately concentrate on their individual comfort, and it becomes a generally accepted practice to escape personal moral responsibility by referring to the public responsibility of the state. If so, it will hardly be the freedom which is the goal of the Natural Law which the natural rights will facilitate, but the egoistic freedom not to care for others. Citizens who could become free to help are enslaved by their short sighted desire for easy life and comfort.

One of the central factors in all this is the one pointed out by Black that natural rights do not tell us what is the right way of using them for good ends[83]. Rights are, in other words, formal in the sense that they define the external act one has the right to undertake. Where the moral substance, i. e. the intention, of the act is concerned, rights are silent. Black suggests that this deficit could

83. *vide supra* at footnote 70

be remedied by an educational effort: one should teach the citizens the Natural Law as the moral substance of the natural rights[84]. So citizens could learn to use rights aright " for the good values which morality demands", and to understand that their rights really are just an expression for the common good of all, not for their purportedly legitimate right to self-gratification. In this way the natural rights would be appropriately defined by and consequently subordinate and therefore compatible with the Natural Law which, as Black puts it, introduces us to the principles of things[85]. For these principles, the natural rights would be, I presume, operational expressions correctly reflecting the normativity of human nature. I have no quarrel with the idea itself: I wish it were ture. Nevertheless, it is doubtful whether it carries the argument all the way home. A major reason for my doubt is a well-known feature of the concept of "right" which tends to receive less attention in the rights discussion than it deserves, viz. the fact that if one has a right to something it entails that one has a right to it even when it is wrong to use one's right to it; consequently, even if it is wrong to use one's right on one moral level, it cannot, on the rights level of the discourse, be wrong to claim one's right. So if rights are considered as overriding considerations, like Dworkin's "trumps", which in a way belongs to the very notion of rights, then it will be right to do wrong now as long as one has a right to do whatever it is that is now wrong to do. An example is the right to appeal to a higher court: even if one knows that one is wrong it is one's right to appeal, never mind how wrong it may be towards the other parties or towards the community. Another example, discussed by Joseph Raz, is a claimed right to civil disobedience[86]. – From all

84. BLACK, *op. cit.* p. 208 p.

85. p. 209.

86. *Vide* Joseph RAZ, *The Authority of Law. Essays on Law and Morality*, Clarendon Press, Oxford 1979, p. 262 pp., where the author concludes that one normally cannot have a right to civil disobedience precisely because such a right entails that one is entitled to disobey even when it is wrong or otherwise inappropriate to disobey, which would be politically unacceptable.

this it follows that if an educational programme includes teaching in terms of natural or any other rights – as Black clearly advocates[87] – it will collide with itself when it at the same time teaches to use those rights in the right way: what is the point of speaking in terms of rights at all if one must at the same time maintain that one of the very things that make rights what they are, i. e. overriding and inviolable considerations, is morally untenable? An answer put forward by Black, and by many others, is that there are important practical considerations which make rendering the Natural Law in terms of natural human rights give a good political pay-off[88]. To this line of argument we shall now turn attention.

4. THE LANGUAGE OF NATURAL RIGHTS – A "SECOND-BEST ALTERNATIVE" TO NATURAL LAW?

An observant reader may now raise a question concerning a parallel between the modern natural rights discourse and the historical distinction between law (*lex*) and right (*ius*)[89]: Is the distinction between natural rights and Natural Law anything else than the classical distinction between *lex naturalis* and *ius naturale*? Now the distinction between *lex* and *ius* is historically ambigous, and it has also been argued that e. g. Aquinas often uses the two words interchageably. Nevertheless there is one important sense in which *ius* is always quite clearly distinct from *lex*: *ius* denotes what is the right thing to do in a particular case, whereas *lex* signifies a general rule which defines a right kind of action in the abstract. With a view to this distinction, it coud well be argued that perhaps the Natural Law represents the category of *lex*, and the natural rights the category of *ius*. Consequently, using a language

87. On p. 209 Black says: "the natural law has to be educated to extend its perspective to the common good construed in terms of natural rights".

88. p. 196 pp.

89. For a discussion, *vide* RENTTO: "Ius Gentium: A Lesson from Aquinas", *The Finnish Yearbook of International Law 1993*, pp. 103-134.

referring to rights would be nothing but talking about the abstract requirements of the Natural Law as they can be applied to particular situations.

Clearly a thought like the one outlined here must be behind Black's words when she says that the notion of wrong is common property between Natural Law and natural rights: "To say that it is not right that somebody do domething is to say that it is wrong that they do it. Is this not the same as to say persons have a *right* that somebody not do this wrong to them?"[90] I would answer her and say: Naturally it is not the same. To equate "he has a right" to "it is right for him" is a case of mistaken identity. For to say that a person has a right to be treated in a given way means something more than just to say that it is right that a person be so treated. It means that he has a general claim to being so treated, no matter what, regardless of whether anyone contemplates on treating him so or not. In other words, rights-language is not particular language. On the contrary, it is an abstract language like the language with which one speaks about the Natural Law. This means that natural rights cannot be particular renderings of the requirements of the Natural Law. All they can be is less abstract renderings of the general principles of the Natural Law. The question is whether they are, as such, appropriate for the purpose of interpreting the intention of the Natural Law.

According to Black, it is, regardless of the philosophical strength of the connection between natural rights and Natural Law, important to argue for natural rights as something that bears a relationship to the Natural Law, because the concept of natural rights is so practical: "rights have consequences of great magnitude for modern society and its citizens"[91]. Rights are useful, not least because they provide an ingenious method for resolving conflicts: with rights we have rights-holders in an adversarial position where

90. BLACK, p. 204.
91. p. 197.

they can go to court and demand that it give each party his right; and what is more, rights put the citizen in an adversarial position towards the state, which makes it easier to protect the individual citizen against the overwhelming power of the government[92]. Rights facilitate making legitimate claims. As Black points out, rights discourse has a strong rhetorical impact, and it carries the argument home more easily than an argument from duties or obligations[93]. Using the language of rights is, in short, an efficacious method of arguing for the requirements of the Natural Law, as well as of putting it into effect.

If we put it this way, natural rights are an instrument, a method, a means to the goals of the Natural Law. The significance of natural rights is *functional*, they are desirable because they are good for a purpose, not because they are good in themselves. From this viewpoint it is also plausible to argue that even if it necessarily does not make good *philosophical* sense to equate natural rights to the Natural Law, it nevertheless makes good *practical* sense to use the language of natural human rights for *political* purposes, both in national and internacional moral discourse, because it is the best, perhaps even the only practically feasible, way of reaching the desirable goals defined by the Natural Law step by step, second only to a direct implementation of that Law itself, which is impossible by *fiat*[94]. The natural rights are something we can actualize instead of the Natural Law for the purpose of instilling the latter in the hearts of men. For want of anything better, if we are to actualize the Natural Law, we must actualize the natural rights. So construed, the argument for natural

92. p. 197 p.

93. p. 198 p.

94. This is precisely what Andrew LEVINE, *op. supra cit.* holds, *vide* especially p. 144 pp. – Authors like SHARMA, *op. cit.* and SINHA, *op. cit.*, come to a similar conclusion: even if the Western conception of natural rights perhaps is not entirely adequate in theory from a non-Western viewpoint, it still is a valuable method to use for the purpose of improving the world.

rights turns into an argument from practical necessity, not entirely unlike the argument of John Finnis for a general obligation to obey the positive law: once a positive legal system has been formed, it is practically necessary if it is to reach its goal, i. e. the common good, defined by the Natural Law, that all its subjects abide by the law in all situations covered by the law, simply because there is no practically efficacious alternative to it[95]. A system of rights is something that *can* be imposed on a real society of real people, and one can hope that once the people have learned to cherish and respect each other's rights they will grow to realize their fundamental obligations according to the Natural Law. In this way rights may have an educational function, too: they impose on citizens a heteronomous increment of virtuous conduct, which they are to develop into a full-blown personal virtue.

But Andrew Levine suggests, referring to Rousseau's way of conceiving society, that human rights are really a poor substitute for a proper education which would genuinely transform "the atomic individuals into a body politic where ... human dignity is inscribed in each person's will"[96]. According to him, human rights are needed merely as a corrective to the predominant liberalistic ideology which in itself reduces one's fellow men to nothing but means to one's individual goals. If that ideology could be replaced by a better one, human rights would "drop away for want of sufficient reason"[97]. Also Black, we have seen, underlines the need to complete the natural rights ideology with a conscious programme of educating the citizens to understand and follow the Natural Law from which the rights supposedly spring. I, for that, would go even further than Levine and suggest that if the natural

95. *Vide* John FINNIS, "The Authority of Law in the Predicament of Contemporary Social Theory", *Notre Dame Journal of Law, Ethics and Public Policy I* (1984), pp. 115-137, and *idem*: "Law as Co-ordination, *Ratio Juris 2* (1989), pp. 97-104.

96. LEVINE, *op. cit.*, p. 146

97. *Ibidem.*

human rights are at the core of the educational programme, that education may more likely only deepen the hold of stark liberalistic individualism on men than modify it to a more compassionate and virtuous direction.

I am afraid that teaching people human natural rights from cradle to grave will produce people who more readily than ever make claims against others rather than take responsibility for their needs, litigate against one another rather than seek compromise and harmony, demand concessions from others rather than make them to others, seek protection for their individual right to self-gratification without intrusion by others rather than care for the wellbeing of their fellows, and consider the state as a contractor or an insurance agency against which they have rights and from which they are entitled to benefits instead of conceiving the political community as a joint enterprise for the common good of all. A human rights ideology encourages one to take pride in one's humanity, instead of exercising humility. It makes one believe that one's self is the centre of the universe instead of just a small grain of sand under the wheel of existence. In short, it makes men think that the world exists for the purpose of stilling their wants and needs, whereas the profound insight of the Natural Law tradition is that the world has an end in which the human beings have a share and for which they have their specific responsibility to carry out in the grand scheme of the universe. The Natural Law assigns man a limited space, a place within the world, a status, and the basic insight which sets man free is a realization of the fact that he cannot surpass those limits but must subdue himself to them. It is this liberating status which the natural human rights threaten to rob from him, in order to enslave him to his passions. This is particulary dangerous in the international context where newly independent and only recently self-conscious nations are imposed an alien reifying individualism which can pull the rug from under the traditional way of life without giving any solid direction for a new way of life in return, without giving the new individual

person a place and status he can understand and handle and live in a satisfactory manner[98].

When one studies non-Western authors who at the same time express their doubts as to the philosophical validity of the idea of natural human rights and nevertheless profess their belief in the importance of their continued propagation and implementation, one can easily see that the common denominator between the pro-human rights attitudes is a shared awareness of the fact that many governments, Western and non-Western alike, fail to care for their subjects or citizens according to the requirement of the Natural Law for the common good of all. What is asked for is not so much that people should adopt the Western conception of human rights, but that they should learn to stand up against a government which misuses its authoritative position for promotion of selfish interests and uses its subjects as means to private winning rather than as ends in themselves. The critical question is how to protect the meek of the land from the excesses of the strong. For this purpose it is useful to resort to a language of human rights, even if one has no faith in the moral superiority of the Western liberal way of life which those rights reflect. But, one may ask, would it not be better if a clear difference were made between the normative human nature and the claims against its violations by unjust governments?

Before we close our inquiry we shall consider an argument by the jusnaturalist John Finnis, designed to show why for most practical purposes it is not only possible and politically useful but also morally correct to paraphrase our statements concerning the Natural Law in a language of natural rights. The argument merits

98. Of course one must bear in mind that it is not necessarily the ideas themselves which cause a change in the way of life. In private discussions with colleagues from mainland China I have recurrently heard the claim that, unawares, China has in fact westernized much more than it is ever willing to admit, due to the long-standing public policy of reducing the number of children in the family. The one child policy has resulted in a growth of a new generation of spoilt and self-centred individuals, I am told, who have no respect for the communal values of the old generations!

separate treatment because it stems from a recent rendering of Natural Law theory which has been as controversial as it has been influential in the past decade or so. The Natural Law consists for Finnis[99], to begin with, in a set of basic goods which are equally self-evident and equally basic, and each and every one of them primary in the sense that none of them can be reduced to any of the others: the basic goods are mutually incommensurable. The Thomasian first principle of the Natural Law, that good is to be done and pursued and evil avoided, is the first principle of practical reason, and the basic goods are its material content: they define what kinds of things are goods to be done and pursued by a human being. But moral reason demands more than just doing and pursuing good and avoiding evil: it requires that one, on the whole, seek an integral fulfilment of human good in its different aspects, i. e. that one seek a whole good for the whole human being instead of merely partial goods for different parts of man. To fulfil this requirement one must abide by a set of principles which define practical reasonableness. Of major importance among these principles is the one which specifies that an integral fulfilment of human good demands that one must never act directly against a basic human good, be it one's own or someone else's. That one's action would violate a persons's basic good is in itself a reason not to take such action, a reason which could only be overridden by a greater good yielded by the action. But such a justification is rationally impossible because the basic goods are all primary and incommensurable. Therefore it is always wrong to act against someone's basic good[100]. It follows that it is an organic part of the

99. For a concise statement of the main ingredients of the theory, *vide* Germain GRISEZ~Joseph BOYLE~John FINNIS, "Practical Principles, Moral Truth, and Ultimate Ends, *The American Journal of Jurisprudence 32* (1987), pp. 99-151.

100. *Vide* FINNIS, *Moral Absolutes. Tradition, Revision, and Truth.* The Catholic University of America Press, Washington, DC, 1991, especially p. 31 pp.

Natural Law that some actions, like taking a person's life, are necessarily evil in themselves because they seek damage to someone's integral fulfilment of human good. Consequently they are absolutely forbidden by the Natural Law. Thus it is the duty of everyone not to violate anyone's basic good. From a different viewpoint, it is practically necessary for the flourishing of an individual human life that other individuals respect a person in every aspect of his basic reality. In other words, human beings *need* that others fulfil their duty according to the Natural Law. At this point rights enter the field: the notion of having natural rights reflects the basic natural human needs[101] and the practical necessity of their protection against violation, if the person is to reach integral fulfilment of human good.

Finnis recognizes that duties and obligations have "a more strategic explanatory role than the concept of rights"[102]. But nevertheless, rights are not less important: for Finnis the rights are an integral part of the common good, required by the Natural Law[103]. Lists of human rights included in international declarations and conventions are ways of "sketching the outlines of the common good, the various aspects of well-being in community"[104]. When one refers to these aspects of human good in terms of rights, one underlines the basic requirement of practical reason that "each and everyone's well-being, in each of its basic aspects, must be considered and favoured at all times by those responsible for co-ordinating the common life"[105]. Finnis does not address the problem which consists in the likely contribution of the natural rights ideology to a more egoistic, claims-oriented and conflict-fostering moral attitude. But instead he argues that rights-

101. As opposed to the benefit and choice theories of rights, *vide* FINNIS, *Natural Law and Natural Rights*. Clarendon Press, Oxford 1980, p. 205.

102. *Ibidem* p. 210.

103. p. 210 pp.

104. p. 214.

105. *Ibidem.*

talk can, quite on the contrary, improve the moral stature of members of the community when it educates them to the insight that some moral actions are absolutely good or absolutely evil and that it is not reasonable to calculate about such actions in the consequentialist terms of whether they produce a greater or smaller amount of good or bad outcomes[106]: a good outcome will never justify an evil action[107]. This I find a sound moral argument, and perhaps it can in some context outweigh the argument from increased egoism. But we must realize that both considerations are relative: the natural rights ideology has certain morally beneficent features relative to a utilitarian ideology, but other morally deficient features relative to a Natural Law doctrine which builds on the notions of responsibility and obligation.

Finnis' conception of natural rights is like Black's, as for him, too, the primary source of those rights is the Natural Law which requires that the common good of all be sought. He will not say that the human rights are limited by the common good, as it is part and parcel of the common good that each and everyone enjoy his freedom to seek his own integral fulfilment in human good[108]. But rights are not everything: they are limited, not only by other rights and the rights of others, but also by other considerations relevant for integral human fulfilment in community, describable in terms of "public morality", "public order", "public health" and the like[109]. Therefore rights clearly are not the *whole* common good but merely a *part* of it. As a consequence, if we take Finnis seriously all way through, it will be morally wrong for a government to promote civil or human rights as if they, instead of the common good, constituted the end of the polity. No statute or policy is morally valid merely because it promotes rights, civil or natural. Hence rights are not, and cannot be, the ultimate moral

106. p. 221.
107. Cf. FINNIS, *Moral Absolutes*, p. 54 p.
108. *Natural Law and Natural Rights*, p. 218.
109. *Ibidem* p. 216 pp.

standard, however useful they may be for the common good, or however practical the language of rights may be for expressing thoughts about the Natural Law. The language of rights may be a second-best alternative to an unfeasible direct appeal to the Natural Law, but only in suitable circumstances. A circumstance which makes a resort to a language of inalienable rights appropriate is when it can work against an unjust government. But where government is by and large just, its propriety is, I would claim, far from evident.

5. APOSTROPHY

Despite the international predominance of the natural rights ideology, the notion of natural human rights is philosophically problematic. The natural rights appear primarily to be a device for the prevention and repression of actions against the Natural Law that defines the human nature, and being a device they are not natural in themselves but only in the extended sense that they are a product of existing natural agents, i. e. human beings. Therefore it would be morally appropriate to realize that they are more likely part of the positive law: perhaps they could be characterized as a modern *ius gentium*, a set of humanly invented considerations which enjoy a general but conditioned validity within the context of the present-day human predicament.

Conceiving of the human rights as a positive order of *ius gentium*, rather than a natural order of Human Nature, would help to keep apart their political usefulness and their philosophical doubtfulness, as well as it would save the people from a moral reindoctrination to a self-centred new morality of claims and conflict oriented individualism. Then it would be possible to tell the people that it is the political duty of the government to let them lead their lives freely on their own, and that it is the civic duty of the citizens to carry out their individual responsibility for the

common good by, among other things, taking initiative for and participating in their own government if their protection against a tyrannous state establishment so requires – and all this without making them believe that their nature demands absolute and inalienable respect from others for their any wish to do whatever they may happen to like to do.

The international human rights discourse would also be well served by a conscious shift from the myth of their "naturalness" and "inalienability" to acknowledging their more humble "humanness": that they are tools deviced by the human reason for a limited purpose in its quest for the common good of all. Then many of the problems related to their philosophical rootlessness in various cultural contexts like the ones we have reviewed here would turn out irrelevant for their practical function. Perhaps the natural rights could then work for a genuinely better world, unlike to-day when they work more for the dissolution of traditional structures in order to support the superiority of the Western ego and make the non-Western world more susceptible of becoming a grateful market area for the products of the industry which lives off the newly created human subspecies of consumers of individual gratification.